GRACE MARK SDN BHD & ORS

v.

THE PERSONS IN OCCUPATION OF LANDS HELD UNDER TITLE NO. CL105545533, CL105545542, CL105545622, CL105554407, CL105545604, CL105553311 & CL105554416, DISTRICT OF TAWAU

HIGH COURT SABAH & SARAWAK, TAWAU
DOUGLAS CRISTO PRIMUS SIKAYUN JC
[ORIGINATING SUMMONS NO: T-24-56-2010]
19 JULY 2011

CIVIL PROCEDURE: *Summary possession of land - Triable issues - Whether raised - Whether occupants squatters or claimants to Native Customary Rights - Whether requirements and procedures under Land Ordinance properly followed to confer upon plaintiffs registered title to disputed land - Whether doctrine of indefeasibility of title alien to Sabah land law - Rules of the High Court 1980, O. 89*

LAND LAW: *Customary land - Native Customary Rights - Whether occupants squatters or claimants to Native Customary Rights - Whether lands fell under lands reserved for Muruts - Whether title of land subject to claims of Native Customary Rights*

The plaintiffs, who had become registered owners of several pieces of land ('the lands'), filed proceedings to obtain summary possession of the lands under O. 89 of the Rules of the High Court 1980 on the premise that they were allegedly occupied by squatters ('the defendants'). However, the affidavit filed on behalf of the plaintiffs revealed that the defendants had planted oil palm on the lands, suggesting they were on the lands much earlier than the plaintiffs. The affidavit also revealed that the defendants had made an application to the authorities for the issue of 'Tanah Penempatan Kaum Murut' in respect of the lands. Certain areas along the Serudong River had been reserved by the state government for the Murut community raising the probability that the defendants may not be squatters but Muruts occupying the lands in exercise of Native Customary Rights (NCR). The plaintiffs contended that as registered owners of the lands, their indefeasibility of title and rights should prevail over the defendants. The defendants' claim to NCR, however, went back some eight generations, well before the 1913 and 1930 Land Ordinances came into being.

Held (dismissing summary possession application; allowing defendants to stay on land until disposal of the trial):

(1) There were triable issues which could not be resolved by way of affidavit evidence. Given the nature of the defendants' claim, it could not be said that they were squatters. There was a need to know whether the lands fell under land reserved for the Muruts. The dispute between the parties was best settled through a trial. (paras 5 & 27)

(2) The defendants said they were not aware of the plaintiffs' land application, hence only a trial could establish whether the requirements and procedure laid out under s. 13 of the Land Ordinance had been complied with. (pars 30)

(3) The doctrine of indefeasibility of title was not applicable and was unknown to the land law in Sabah. While the state government may have acquired a radical or ultimate title to all the land, that title was subject to any claims of NCR. (para 16)

Case(s) referred to:

Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors [2011] 6 CLJ 733 CA ***(not foll)***

Narinder Kaur v. Deyoh Opong & Ors [1997] 2 CLJ 895 HC ***(refd)***

Ng Kon Yu v. Sakim Saiking & 4 Ors [2001] 1 LNS 37 HC ***(refd)***

Oyekan & Others v. Adele [1957] 2 All ER 785 ***(refd)***

Pyx Granite C v. Ministry of Housing and Local Government And Others [1959] 3 All ER 1 ***(refd)***

Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(foll)***

Zaibar Auto (Malaysia) Sdn Bhd & Anor v. Shell Malaysia Trading Sdn Bhd [1996] 4 CLJ 212 CA ***(refd)***

Legislation referred to:

Land Ordinance (Sabah Cap 68), ss. 13, 41(2)

Rules of the High Court 1980, O. 14, O. 28 r. 8, O. 89 r. 8

Other source(s) referred to:

Malaysian Court Practice 2011, pp. 1423, 1427, paras. 89.1.4, 89.6.6

Owen Rutter, *British North Borneo, An Account of its History, Resources and Native Titles 1922*, pp 66, 226, 265

For the plaintiffs - Liew Hon Min (Tracy Voo with him); M/s Liew Hon Min & Co
For the defendants - Kong Hong Ming; M/s Lee & Kong

Reported by Ashok Kumar

JUDGMENT

Douglas Cristo Primus Sikayun JC:

[1] This is an application under encl. 16 (O. 89 r. 8) to set aside my earlier order dated 24 February 2011.

[2] I have read all the cause papers including encl. 23 (affidavit in opposition by Datuk Lim Yu Ming) and encl. 24 the plaintiffs' submission and I have heard Miss Tracy Voo and Mr Liew Hon Min both counsel for the plaintiffs.

[3] The law on the merits of an O. 89 for summary possession of land is replete with decided cases. See p. 1423 and p. 1427 of *Malaysian Court Practice 2011* paras. 89.1.4 and 89.6.6. It is akin to an O. 14 application for summary judgment where only in clear and obvious case will the applicant succeed.

[4] Gopal Sri Ram JCA in respect of the scope of O. 89 Rules of The High Court 1980 in the case of *Zaibar Auto (Malaysia) Sdn Bhd & Anor v. Shell Malaysia Trading Sdn Bhd* [1996] 4 CLJ 212 at p. 216 said:

> The Rule has always been read as it ought to be read, as applying to squatters pure and simple. It does not apply to tenants who hold over. It does not apply to one who enters upon the land who remains in occupation with the consent of the applicant under the Order or any predecessor in title of such an applicant. It does not apply to persons who are in occupation under a legitimate expectation of receiving from the State Authority issue documents of title to the portion they occupy.

[5] The first question to address is whether the defendants are squatters. I refer to the affidavit in opposition by Datuk Lim Yu Ming at para. 8 where he alleged the defendants had planted crops of economic value on the disputed land eg, oil palm. This must necessarily mean that the defendants were there much earlier than the plaintiffs. Further I refer to paras. 18 and 19 of Datuk Lim's affidavit where he mentioned the defendants' land application in 1985 and the issue of "Tanah Penempatan Kaum Murut". It is a fact that the State Government has reserved certain areas along the Serudong River as reserved for the Muruts. Some are forest reserve. In order to determine these, there is a need for trial. We need to know whether the disputed land falls under the land reserved for the Muruts.

[6] Having spent my earlier years in Tawau, particularly on Sebatik, I take judicial notice of the presence of the Muruts Communities living along the rivers of Serudong, Kalabakan and Selimpopon. Hence I do not think they are squatters.

[7] Owen Rutter in his *Book British North Borneo, An Account of its History, Resources and Native Titles 1922* at p. 66 classified these defendants as "the Pensiangan (or Lagungan) Muruts. These are closely allied to the Sepulot people and are their neighbours in the north, extending south to the Dutch border and southeast to the headwaters of the Serudong and Kalabakan Rivers"

[8] It is quite logical to assume that they could have walked down stream.

[9] I now refer to pp. 226 and 265 of Owen Rutter's book for a bit of background on the development of NCR where he said:

> At page 226:
>
> Unfortunately large areas of North Borneo are now under this secondary jungle, thanks to the uneconomic methods of the up-country native, who, as already described, prefers to prepare his fields by felling virgin jungle rather than by clearing this secondary bush. This has been his custom from time immemorial, and being intensely conservative he is hard to wean from his wasteful ways, especially as, by following the example of his fathers, he can expect a large crop with little toil. For this reason the conservation of the forests presents a very difficult problem; old and convenient customs die hard, and while it is one thing to make ordinances it is another to enforce them, especially among scattered up-country tribes such as the Dusuns and Muruts.
>
> And at page 265:
>
> These and many other varieties are mainly in the hands of the natives, though they are preserved rather than cultivated. It would be difficult to say who planted them, but every tree has an owner, even when it grows in the jungle, as many an estate manager has found to his cost.

[10] And that is the life of the native, practicing shifting cultivation and roaming and collecting jungle produce.

[11] Professor Danny Wong Tze Ken of the Department of History University of Malaya described this book as the "most comprehensive book on North Borneo". When it was published in 1922 it was the standard reference book till the publication of KG Treggoning's *Under Chartered Company Rule* in 1958.

[12] Chapters 11 and 12 are devoted to native affairs where there is an in depth discussion on native customs and folklore and a description of their culture and livelihood.

[13] Owen Rutter acknowledges the existence of the NCR and that was the common law of the land accepted by the British administrators. It existed pre-legislation.

[14] Lord Dening in the Privy Council case of *Oyekan & Others v. Adele* [1957] 2 All ER 785 in an appeal from the judgment of the Supreme Court of Nigeria said: A

> In enquiring, however, what rights are recognized, there is one guiding principle. It is this: The Courts will assume that the British Crown intends that rights of property of the inhabitants are to be fully respected. B

[15] Closer to home we have the decision of the Federal Court in *Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh* case [2007] 6 CLJ 509 where Justice Ariffin Zakaria FCJ delivering the Court's decision at p. 527 said: C

> With respect, we are of the view that the proposition of law as enunciated in the 2 cases reflected the common law position with regard to native titles through the Commonwealth. It was held by Brennan J, Mason CJ and McHugh J concurring in Mabo No. 2 that by common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire absolute beneficial ownership of the land. The Crown's right or interest is subject to any native rights over the land … the system of Crown grants must be regarded as having been introduced mainly, if not exclusively for conveyancing purposes. D E

[16] In short what the Federal Court was referring to was that the State Government may have acquired a radical or ultimate title to all the land but that title is encumbered. It is subject to any claims of NCR.

[17] I hold this to be true and I relate the NCR to the following two legislations: F

[18] In the Forest Enactment a native may collect forest produces and fell timber for his house and fence. The State Government recognises this right and is reflected by the decision of Justice Richard Malanjum in *Felix Sitom*'s case and the decision of Justice David Wong in *Andaman Ansip & others v. PP* (Case K41-128-2010). G

[19] And in s. 13 of the Land Ordinance, a statutory duty is imposed on the collector to publish a notice calling for any claimants of NCR whenever there is an application for country land which have not been alienated. The government cannot alienate any country land without first publishing such a notice. H

[20] The above two pieces of legislation fortified my view that the government recognises the NCR of the natives of Sabah. I

[21] But the plaintiffs say that they now hold the titles and they are the registered owners. It is on this basis they come to court seeking an O. 89 recovery of possession.

[22] The plaintiffs further contend at para. 3 at p. 7 of their submissions and I quote "... the indefeasibility of title and rights conferred to the plaintiffs as the registered owner of the plaintiffs' land shall prevail".

[23] With respect, I cannot agree to this. The doctrine of indefeasibility of title is not applicable and unknown to the land law in Sabah.

[24] On this issue of being the registered owner and indefeasibility of title, I need only to refer the decision of Richard Malanjum J in *Ng Kon Yu v. Sakim Saiking & 4 Ors* [2001] 1 LNS 37 where he said:

> There is no doubt that the Plaintiff is now the registered owner of the said land after purchasing them from the vendors ... And it is important to note that under the Ordinance there is no provisions for indefeasibility of titles unlike in Peninsular Malaysia or the Sarawak Land Code (see *Borneo Housing Mortgage Finance Bhd v. Times Engineering* [1996] 2 MLJ 12). Hence if the approval of the land application by the vendors were secured contrary to law in that the procedure and requirement were not regularly complied with, can it not be said that the alienation was not in Order? Or should the stand be taken that once a title deed has been issued nothing could be done to undo any error? These are yet indicators that the issues involved in this case are not without merits but warrant further consideration after a full trial.

[25] Further His Lordship Justice Ian Chin in the *Rambilin*'s case (K22-71-2000 and K25-02-2001 and K24-240 of 2002) said that the High Court can set aside and nullified the registration of the issued title documents.

[26] *Rambilin*'s case sets out in detail the historical background of the native's customary tenure and the development of NCR.

[27] I hold that there are triable issues which I cannot resolve by way of affidavit evidence. Given the nature of the defendants' claim, I cannot say that they are squatters. The dispute between the plaintiffs and the defendants is best settled through a trial.

[28] For purpose of this O. 89 application, I make no finding as to whether the defendants have established NCR over the disputed land.

[29] I only say there are indeed triable issues. In the event of an appeal, I shall give further grounds why I say there are triable issues.

[30] Further the defendants say that they were not aware of the plaintiffs' land application, hence only a trial can establish whether the requirements and procedure laid out under s. 13 of the Land Ordinance has been complied with. Is it sufficient for the collector to publish the required notice by just placing it on his notice board? Should he not bring it to the attention of the natives living on the disputed land? Should the court give a purposive or literal interpretation of s. 13?

[31] Again these are issues that can be disposed of only at trial.

[32] The only issue now is whether this court should follow the recent Court of Appeal's decision in *Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors* [2011] 6 CLJ 733.

[33] I am aware that Justice Rahman Sebli has adopted and applied the Court of Appeal's decision of *Darinsok* when he heard and dismissed the plaintiffs' claim in the *Syarikat Kerjasama Perkembangan Tanah Pegagau Bhd* case recently.

[34] With the greatest of respect I decline to follow *Darinsok*'s case and I say so as follows:

[35] I have the occasion, when I was in practice, to argue the similar mater ie, on s. 41(2) and that the matter on NCR claim should be referred to the Assistant Collector of Land Revenue. In Suit T21-58 of 2006 Justice Linton Albert ruled in my favour and I quote the relevant passage of his judgment:

> According to the Defendants the Plaintiffs' claims ought to fail not least because the court has no jurisdiction to determine native customary rights by virtue of section 41(2) of the Land Ordinance which expressly provides that no court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by the Ordinance to a Collector or Director (See *Burhan bin Ating & 418 Ors v. Director Of Lands And Surveys & 2 Ors* [1992] 2 CLJ 1203).
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> I need only refer to the Federal Court case of *Superintendent Of Land And Surveys, Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 to demolish the foregoing propositions advanced on behalf of the Defendants which were based on statutes enacted after the rights had been acquired and exercised by the Plaintiffs' respective ancestors. The relevant parts of the headnote reads:
>
> (1) The proposition of law as enunciated in the two cases of *Adong Kuwau (supra)* and *Nor Anak Nyawai (supra)* reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in the Australian case of *Mabo (No. 2)* that by the common law, the Crown may acquire a radical title

A or ultimate title to the l and but the Crown did not thereby acquire beneficial ownership of the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v. Secretary*, Southern Nigeria, where the Privy Council in appeal from the Supreme Court of Nigeria held that radical title to land
B held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community if which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not
C exclusively, for conveyancing purposes. Although the instant case dealt with individual rights and not communal rights, the principal applicable was the same. *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (foll); *Mabo (No. 2)* (foll); *Amodu Tijani v. Secretary, southern Nigeria* (foll). (paras 22 & 23)

D (2) Native holdings are not only recognized by the 1920 Regulations, but where possible, such holdings may even be registered. Registration, however, is not a necessary prerequisite for such holdings to be recognized. In the light of this, it was erroneous to hold, as was held by the learned Judicial Commissioner in the present case, that native customary rights in Sarawak were only
E created by s. 66 of the Ordinance. What s. 66 purported to do was to stipulate new conditions before native customary rights could be recognized after the coming into force of the Ordinance. It does not purport to nullify native customary rights that had been acquired or recognized prior to the coming into force of the Ordinance. In other words, it has no retrospective
F force. The respondent's claim in this case arose from circumstances which occurred prior to the Ordinance, since his father and his forefather had been in occupation of the said land prior to 1922. It was not in dispute that the respondent was born on the said land in 1922.

G (3) …

(4) …

(5) …

(6) …
H

(7) … this court wholly agreed with the view expressed in *Adong Kuwau (supra)* and *Nor Anak Nyawai (supra)* that common law respects the pre-existence or fights under native laws or customs.

The arguments advanced on behalf of the Defendants are patently
I unsustainable in the light of the foregoing judicial pronouncements of our Apex Court.

[36] In the course of delivering my oral ruling on 19 July 2011, I asked Datuk Kong Hong Ming whether the Federal Court case on *Madeli* was cited by any one of the counsel who appeared at the Court of Appeal in the *Darinsok* appeal. He informed that not only was the *Madeli* case not mentioned; there was also no argument on the common law pre legislation NCR. It is possible that *Darinsok*'s case was decided *per incuriam* as the Court of Appeal do not have the benefit of having *Madeli*'s Federal Court decision before them or brought to their attention. (Datuk Kong has now informed me in writing on ... That he had misunderstood me. *Madeli* was in fact cited in their submission as well a the common law native customary rights)

[37] I have read the decision of the Court of Appeal and I am uncertain from that judgment whether it refers to only post legislation or whether it includes the common law pre-legislation NCR.

[38] In our instant case the defendants claim on NCR backdate to some eight generations well before the 1913 and 1930 Land Ordinances.

[39] I am bound by the Federal Court's decision in *Madeli* where the court held that the land ordinance has no retrospective effect and for that reason I decline to follow *Darinsok*.

[40] Further the order of Court of Appeal to the collector ordering him within 60 days to hear the NCR claims cannot be correct as the disputed land in question have already been alienated. The Sabah Land Ordinance is clear. The collector has no jurisdiction to hear NCR claims on titled land.

[41] See the decision in *Narinder Kaur v. Deyoh Opong & Ors* [1997] 2 CLJ 895 which says that NCR claims can only be maintained against State Land and not alienated land.

[42] So where does one got to when one has an NCR claim on a titled land especially where he alleges non compliance with s. 13 of the Land Ordinance?

[43] Assistant Collector of Land Revenue cannot hear the matter.

[44] No alternative avenue is available under the Land Ordinance.

[45] Can he not go direct to the High Court?

[46] Is the English House of Lords case of *Pyx Granite C v. Ministry of Housing and Local Government and others* [1959] 3 All ER 1 applicable to this sort of situation?

[47] This is food for thought.

[48] In the circumstances I give the following orders:

(a) I set aside my earlier order dated the 24 of February 2011 and grant the orders sought for in encl. 16 with costs; and

(b) I dismiss the O. 89 application under encl. 2 with costs.

(c) All costs to be taxed if not agreed.

(d) I do not propose to exercise my powers under O. 28 r. 8 to convert this originating summons into a writ. Taxed costs are to be paid before the plaintiffs are allowed to file their writ of summons.

(e) The plaintiffs are not entitled to "self help."

(f) The defendants are entitled to stay on the disputed land that they now occupy until the disposal of this matter at trial.